

8 April 1946

Hon. Dan E. Garvey
Secretary of State
Capitol Building
Phoenix, Arizona

LAW LIBRARY ARIZONA ATTORNEY GENERAL

Dear Mr. Garvey:

We acknowledge receipt of your letter of 27 March 1946, in which you request our opinion on the following questions:

"(1) A number of Indians who are discharged veterans of the military forces and who are now working and do not intend to return to their reservations wish to register and vote in this state. The question has been raised as to whether or not such Indians are eligible to register and vote in this state.

(2) Discharged veterans returning to this state, whose families, during the time they were in the service, have moved to this state and established residence here, desire to register and vote in this state although they have not resided in this state a full year prior to the date of election. The question is whether or not these men are eligible to register and vote".

In 1928 our Supreme Court, in the case of Porter v. Hall, 34 Ariz. 308, 271 Pac. 411, held that Indians were ineligible to vote in the State of Arizona because of our constitutional provision refusing suffrage to persons under guardianship. The Court held in that case that until the federal government determines that Indians are released from guardianship and that their status in regard to citizenship is the same as that of any other citizen, the law of this state prohibits them from voting.

Congress has extended citizenship to any person born in the United States to a member of an Indian *** tribe. Tit. 8, U.S.C.A. 601, and therefore the only barrier that stands between an Indian and his right to exercise his vote in Arizona is the question of whether the Indian is under guardianship. The courts hold that it is for Congress to determine when and how that relationship of guardianship shall be abandoned. In re Heff, 197 U.S. 488; 49 L.Ed. 848; 25 Sup. Ct. 506.

The general statement of law contained 27 Am. Juris. 543, para. 49, states:

"Individual Indians who have severed their connections with the tribe to which they belong, or who no longer maintain their tribal relations, are subject to the laws of the state where they happen to be, unless specially excepted by the United States".

We conclude that when an Indian becomes emancipated he is no longer under guardianship and, if he meets the other requirements of the statute, is qualified to vote in Arizona. The question of emancipation is a question of fact that must be considered in each individual case, at which time the decision must be made as to whether the Indian has complied with the various congressional enactments permitting him to free himself from any vestige of governmental control. It is for the federal government alone to abandon that guardianship over the Indian and permit him to assume and be subject to all the privileges and burdens of one sui juris.

This would appear to be a situation in which appropriate organizations could make an appeal to Congress to set up an emancipation procedure for Indians, if they chose to avail themselves of it, who have served honorably with the armed forces of the United States.

There are many Indian tribes existing within the State of Arizona and the United States. It has been said that there are more full-blooded Indians in this State than in any other. It is our opinion that the eligibility of an Indian to vote is a question to be determined in each individual case and then upon determination that emancipation has been completed, the right of suffrage must be extended to that individual. It was aptly stated by Judge McAlister in Porter v. Hall, supra:

"* * * But so long as the federal government insists that, notwithstanding their citizenship, their responsibility under our law differs from that of the ordinary citizen, and that they are, or may be, regulated by that government, by virtue of its guardianship, in any manner different from that which may be used in the regulation of white citizens, they are, within the meaning of our constitutional provision, 'persons under guardianship', and not entitled to vote".

Therefore, we submit that we cannot lay down the rules in response to a general question as to whether an "Indian" is entitled to vote because of his residence outside of the reservation. Your question is framed as to Indians who are veterans; military service alone, or an honorable discharge from the service, does not of itself change the relationship of guardian and ward.

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In answer to your second question, you again request information of a general nature which must rest upon a precise fact-situation in each case. However, it will be possible to propound a few general rules which may serve as a guide to the appropriate officials.

Section 55-512, A.C.A.1939, lays down the general principles to be followed and is in effect a declaration of the existing law on acquisition of residence.

The use of the term "residence" in Section 55-201, A.C.A.1939, in respect to voting, appears to be a use in which "residence" and "domicile" are considered synonymous terms. See 28 C.J.S. p. 7, para. 2 (b).

There are three types of domicile: (1) domicile of origin, which is generally the place where one is born; (2) domicile by operation of law, which is that domicile attributed by the law to a person independently of his own intention or actual residence; and (3) domicile of choice, which is defined as the place which a person has elected and chosen for himself to displace his previous domicile and which has for its true basis or foundation the intention of the person. It is with this last domicile that we are primarily concerned. Domicile of choice is entirely a question of residence and intention, or as it is frequently put, of factum and animus. To constitute such a domicile or to effect a change of domicile, there must appear both an actual residence in a particular location and an intention to remain there or to make it one's home. Applying this rule it is seen that at some time there must occur a union of residence and intention, and that the moment that union occurs the person has acquired a new domicile, and if his intention remains unchanged the person is domiciled at that location from then on. So therefore, we may generally say that if a soldier, ex-serviceman, or any other person is within the State of Arizona under such conditions as permit him to become a resident of the State, as distinguished from domiciled therein, and during that period forms the intention to reside primarily in Arizona and make it his home, from that

moment on that person is domiciled in Arizona and is a resident of Arizona within the meaning of Section 55-201, A.C.A.1939, and one year thereafter becomes eligible to vote.

In that connection we may say that the location of a man's wife or family is not necessarily a fact that is a conclusive determination of his domicile. See In re Daggett, 174 N.E. 641; 75 A.L.R. 1251.

There is a qualification to this rule. It is universally held that the fact that one is on military duty does not preclude him from establishing his residence where he is stationed, if he so desires, BUT he must have some period of residence off the military reservation. The cases without exception hold that there must be some period of time in which a person in military service resides on territory other than the military reservation where he is assigned. See Notes, 148 A.L.R. 1411; 149 A.L.R. 1471; 150 A.L.R. 1468; 151 A.L.R. 1468.

The manner in which residence could be obtained off the reservation admits of too many fact-situations for us to attempt illustration and each case must be resolved by an application of the principles enunciated above to what actually is the case in the situation under consideration.

If a precise fact-situation is presented in the cases of Indians or any other individuals, this office will be pleased to advise in each case.

Yours very truly,

JOHN L. SULLIVAN, Attorney General

JOHN W. ROOD, Asst. Atty. General

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moment on that person is domiciled in Arizona and is a resident of Arizona within the meaning of Section 55-201, A.C.A. 1939, and one year thereafter becomes eligible to vote.

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